MOTION FILED
AUG 1 1986

No. 85-1370

(8)

In the Supreme Court of the United States

October Term, 1985

ARKANSAS WRITER'S PROJECT, INC., *Appellant*

V.

CHARLES D. RAGLAND, Commissioner of Revenue of the State of Arkansas, *Appellee*

On Appeal From the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ARKANSAS CIVIL LIBERTIES UNION

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

1. Pursuant to Supreme Court Rule 36.2, permission to file the Brief Amici Curiae was sought from the parties; the appellant consented; the appellee refused.

2. The American Civil Liberties Union Foundation ("ACLU Foundation") is a national non-profit organization dedicated to the preservation of the rights and liberties embodied in the United States Constitution, and particularly, in the Bill of Rights. The Arkansas Civil Liberties Union is an affiliate of the ACLU. Through litigation as well as public education, the ACLU Foundation and its affiliates seek to protect all of the fundamental constitutional rights protecting individual liberty, including the rights to free expression (particularly the freedom to dissent).

3. The interest of the ACLU Foundation in this case is based on its concern that the First Amendment rights of the appellant be protected from discriminatory state tax exemption statutes. Moreover, the exemption statutes at issue here raise the potential for further serious violations of the freedom of speech and freedom of press clauses of the First Amendment which will have significant ramifications for the First Amendment freedoms of all citizens.

Respectfully submitted,

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INTEREST OF AMICI

The interest of the amici is fully set forth in the motion for leave to file Brief Amici Curiae.

STATEMENT OF THE CASE

The appellant, Arkansas Writer's Project, Inc., is an Arkansas corporation and publisher of Arkansas Times, a general interest monthly magazine with a circulation of approximately 25,000. Arkansas Times publishes many articles of the kind which frequently appear in newspapers, as well as in the religious, sports, professional, and trade journals published and circulated in Arkansas. It competes with such publications for sales of advertising. Distribution methods used by Arkansas Times, through subscription and over-the-counter sales, are identical with the

distribution methods of other publications, and the method of production of the Arkansas Times is nearly identical to the method of production of all other publications in Arkansas.[1]

The issues which are now ripe for review first materialized in January, 1984, when appellant, in accordance with proper administrative procedure, brought a claim for refund of sales taxes paid to the State of Arkansas pursuant to a tax audit. Appellant then argued both that the "magazine exemption" set forth in Section 84-1904(j) exempted Arkansas Times from sales tax and that if Arkansas Times was not exempt then taxation of

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[1]The stipulated facts established that Arkansas Times is printed and published within Arkansas, and that about eighty percent (80%) of the monthly sales are to regular subscribers. The remaining twenty percent (20%) of its sales are divided between vending boxes similar to those used by newspapers, and sales to retailers for their over-the-counter sale. Opinion of Chancellor Bruce T. Bullion, March 29, 1985.

Arkansas Times, while the sales of newspapers and other magazines were exempted, violated appellant's First Amendment rights.[2]

Appellee, acting within his jurisdiction, denied the claim for a tax refund and an appeal from that determination was taken with the Pulaski County Chancery Court. The Chancellor's resolution of the matter dealt with the literal interpretation of the "magazine exemption," but never addressed the constitutional issues. The Chancellor held that the "magazine exemption" applied to appellant, and this result was appealed to the Arkansas Supreme Court.

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[2]The litigation had begun in 1980 when the Arkansas Commissioner of Revenue, appellee herein, performed a sales tax audit on appellant. The assessment was contested through the administrative process, including an appeal to the Chancery Court of Pulaski County, Arkansas. The case was settled in September, 1982, and appellant agreed to pay sales tax. The issue was revived after this Court's decision in Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), when the State again imposed a tax on the appellant.

On October 14, 1985, the Arkansas Supreme Court held that the Chancery Court erred in its construction of the statute, and that the "magazine exemption" did not exempt sales of Arkansas Times, but applied only to religious, sports, professional, and trade journals published in Arkansas. Ragland v. Arkansas Writers Project, Inc., 287 Ark. 155, 697 S.W.2d 94 (1985). (Ragland I)

Although appellant repeatedly argued that the denial of the exemption infringed its First Amendment rights, the Arkansas Supreme Court did not address that argument until November 18, 1985, when it issued its supplementary opinion pursuant to a petition for rehearing. The Court then held that, as applied, the exemption statutes were constitutional under the First Amendment, and that the Arkansas Gross Receipts Tax was distinguishable from the taxes reviewed by this Court in Minneapolis Star, supra, and

Grosjean v. American Press Company, 297 U.S. 233 (1936), because the Arkansas tax was an "ordinary form of taxation" a general revenue-raising device, from which publications were not necessarily immune.

SUMMARY OF ARGUMENT

The appellant magazine, the Arkansas Times, a monthly general interest publication, is taxed pursuant to the Arkansas Gross Receipts Tax, even though that law exempts all newspapers as well as religious, sports, professional, and trade publications published in Arkansas.

Any tax imposed on the press creates some burden on First Amendment freedom. However, a tax that is non-unfiscatory and that is applied even-handedly may be constitutionally imposed, even on the press. In the instant case, since the tax is clearly

a differential, as opposed to a generally-applied tax, the tax exemption classification scheme comes to the Court with a presumption of constitutional infirmity and the state must advance a compelling interest sufficient to justify its application.

The State of Arkansas has not asserted any compelling basis for the classifications and the statutes are not narrowly written in order to avoid burdening the First Amendment. The Arkansas Supreme Court erred in upholding the statutes, which are clearly unconstitutional.

ARGUMENT

The issue in this case is whether the Arkansas Gross Receipts Tax which impose a tax on appellant, while exempting newspapers and religious, sports, professional, and business journals from taxation, violates the freedom of speech and freedom of the press clauses of the First Amendment to the United States Constitution.

The classification system of sales tax exemptions in Arkansas codified in §§84-1904(f) and 84-1904(j) is repugnant to the fundamental freedoms protected by the First Amendment, because appellee cannot demonstrate any "interest of compelling importance that it cannot achieve without differential taxation to justify such a discriminatory taxing scheme." Minneapolis Star & Tribune Company v. Minnesota Comm. of Revenue, 460 U.S. 575 (1983); United States v.

Lee, 455 U.S. 252 (1982); United States v. O'Brien, 391 U.S. 367 (1968); NAACP v. Alabama, 357 U.S. 449 (1958). The only colorable effort by appellee to advance a state interest significant enough to justify this constitutional infringement is its reference to the alleged "reasonable distinctions" between religious, professional, trade, and sports publications and Arkansas Times.[3] However, such distinctions are illusory.

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[3]Appellee's "rational basis" discussion, as set forth in its brief to the Arkansas Supreme Court, argues that publications devoted exclusively to religion, or to a profession, is of interest to a smaller segment of the population than Arkansas Times, and this fact "conceivably" could have influenced the state legislators when they drafted the exemptions. Notwithstanding the fact that First Amendment infringement mandates a "compelling interest" analysis, appellee's attempts to "fill in" the legislative history of these statutues are self-serving at best.

I. THE "NEWSPAPER" AND "MAGAZINE" EXEMPTIONS TO THE ARKANSAS GROSS RECEIPTS TAX VIOLATE THE FIRST AMENDMENT.

A. The tax exemption classification system as applied to Arkansas Times severely burdens the First Amendment.

The First Amendment does not prohibit all regulation of the press, and it is clear that the states may require publications such as newspapers and magazines to comply with generally applicable economic regulations without abridging constitutional rights. Branzburg v. Hayes, 408 U.S. 665 (1972); Citizens Publishing Co. v. United States, 394 U.S. 131 (1969). In other words, non-discriminatory taxes on the receipts or

income of newspapers are permissible, and this court has consistently recognized this fact in dictum in cases where it found First Amendment violations. Grosjean, supra; Follett v. McCormick, 321 U.S. 573, 578 (1944) (dictum); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (dictum).

Notwithstanding the fact that any form of taxation imposes some burden on the press, all of the cases in which this court has upheld economic regulation of the press have as their common denominator the non-exclusive application of the regulations involved. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Associated Press v. NLRB, 301 U.S. 103 (1937). In Follett, supra, this court found a constitutional violation where the state had imposed a flat tax, basically unrelated to the receipts or income of the taxpayer or even to the expenses of administering a valid regulatory scheme,

and established it as a condition precedent to the right to speak. This Court stated, in Minneapolis Star, supra, that by imposing a tax as a condition on engaging in protected activity under the First Amendment, the state creates a prior restraint on protected speech, which bears a very heavy presumption of constitutional infirmity. 460 U.S. at 587, n.9. See, Murdock, supra.

There is no cause for concern when a taxing mechanism is evenly, generally applied. Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). A discriminatory tax, however, gives government a "powerful weapon" against the taxpayer selected. Minneapolis Star, supra.

The Arkansas Supreme Court must be reversed, because it failed to impose the proper burden on the State. This reasoning is

manifest in the following passage from the Opinion:[4]

> "The legislature has levied a valid sales tax that is applicable to the Times. It is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the Times. The courts cannot create a tax exemption; that must be done by the legislature. It has not exempted the Times."

Ragland v. Arkansas Writers' Project, Inc., 287 Ark. 155, 698 S.W.2d 802,. 803 (1985) (Ragland II).

The very same flawed analysis was addressed by this Court in Minneapolis Star, supra, in reply to an argument by the Minnesota Commissioner of Revenue. The Commissioner had argued that under Oklahoma

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[4]The Arkansas Supreme Court couched its analysis in a "two-fold" context, that is addressing separately the appellant's arguments based on the equal protection clause of the Fourteenth Amendment, and the freedom of speech and freedom of press clauses of the First Amendment. The excerpted analysis addresses the equal protection argument.

Press Publishing Co., supra, the press could not successfully challenge regulations on the basis of the application of the exemption to other enterprises. This Court stated:

> "We disagree. The exempt enterprises in Oklahoma Press were isolated exemptions and not the rule. Here, everything is exempt from the use tax on ink and paper, except the press." (Emphasis added).

460 U.S. at 582, n.5.

Analogizing the Minnesota tax exemption structure to the tax exemptions structure in the instant case, the magazine and newspaper exemptions apply to the majority of publications in Arkansas, while the tax burden under Ark. Stat. Ann. §84-1903, et. seq., falls on the shoulders of a select few publications, including appellant. Arkansas Times is the only Arkansas publication sold through regular subscriptions which is subject to this tax. Such treatment cannot possibly survive a constitutional analysis unless the state can assert a counter-balancing interest

of compelling importance which it could not accomplish without the differential taxation. Minneapolis Star, 460 U.S. at 585; United States v. Lee, supra; United States v. O'Brien, supra; NAACP v. Alabama, supra.

B. Appellee cannot assert a counterbalancing interest of compelling importance to justify the differential tax exemption scheme.

1. The State of Arkansas has no compelling interest in the "newspaper exemption" contained in Section 84-1904(f) or in the "magazine exemption" contained in Section 84-1904(j).

While the taxing power of the State of Arkansas is considerable, the State must meet a heavy burden when it imposes differential taxes or exemption schemes which single out certain groups, publishers, or segments of

the press for special treatment. See, Alaska v. Arctic Maid, 366 U.S. 199, 205 (1961). A bare assertion that the taxing scheme is necessary as a revenue-raising mechanism is not a compelling interest and is an affront to the First Amendment. Under general First Amendment principles, the appellee must come forward with a compelling interest.

On its face, the classification scheme suggests no logical or rational, let alone, compelling basis for its existence.[5]

Furthermore, although it has had ample opportunity, appellee has failed to assert a compelling state interest, or any

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[5]In a Reply Brief in response to the appellee's brief in support of its Motion for Summary Judgment to the Pulaski County Chancery Court, filed August 30, 1984, appellee states that one of the "reasons" for including journals devoted to religion, a profession or trade, and sports in the "magazine exemption" is that the publishers of those journals would "in most cases" be publishing them as a service to their readers rather than as a means of generating income.

basis, for the classification scheme. Appellee has "suggested" that a legitimate basis for the "newspaper" exemption would be the fact that a newspaper reports current events to the general public as a whole, and is normally printed and published on a daily basis,[6] but this argument carries absolutely no weight in a First Amendment analysis. Even when faced at the trial court level in this case with the appellant's argument that there was "no rational distinction between a 'newspaper' and the Arkansas Times,"[7] the appellee failed to address this issue.

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[6]The difference between newspapers and other publications is codified in Regulation No. GR-48(A) of the Gross Receipts Tax Regulations, defining "newspaper", in pertinent part, as "a publication in sheet form containing reports of current events, articles of general interest to the public, published regularly in short intervals..."

[7]Appellant made this argument below, citing Ragland v. K-Mart Corp., 274 Ark. 297, 524 S.W.2d 430 (1981).

C. The tax exemption classification is not narrowly drawn to achieve the State's interest, nor is it written in a way which would avoid burdening fundamental First Amendment rights.

Appellee's tax exemption classification scheme is not necessary to achieve its revenue-raising goals, and nothing would prevent the Arkansas General Assembly, from developing a taxing scheme which does not burden the First Amendment.

In Speiser v. Randall, 357 U.S. 513 (1958), this court stated that, "it cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." 357 U.S. at 518. Discriminatory taxation of the press raises a heavy presumption of unconstitutionality and any differential treatment of the press

carries with it the threat of "the possibility of subsequent differentially more burdensome treatment." Minneapolis Star, 460 at 488; NAACP v. Button, 371 U.S. 415 (1963). Thus, unless the tax classification system is evenly applied, it infringes on appellant's First Amendment rights.

In Broadrick v. Oklahoma, 413 U.S. 601 (1973), and more recently, in Brown v. Hartlage, 456 U.S. 45 (1982), this Court held that any statutory limitations on the exercise of First Amendment rights of the press must be narrowly drawn. In Buckley v. Valeo, 424 U.S. 1 (1976), this court held that federal restrictions on expenditures by political candidates threatened the most fundamental First Amendment rights and held that those restrictions could be justified only by the government's interests in limiting corruption in campaign fund-raising and in equalizing candidates' economic resources. See, in Mabee

v. White Plains Publishing Co., 327 U.S. 178 (1946), where this Court upheld the differential exemption from the Fair Labor Standards Act of small, weekly, and semi-weekly newspapers, and where the compelling interest was to put those papers on economic parity with other small town enterprises.

No compelling economic, social, or political interest is served by the exemptions codified in §84-1904(f) and §84-1904(j). Despite appellee's winsome speculation on the reasons for the scheme, appellee has utterly failed to present a colorable argument to counter the infringement on appellant's rights. Minneapolis Star, 460 U.S. at 597.

When drafting the First Amendment, the Framers intended to extend explicit constitutional protection to the institution of the press in this society and were concerned with preserving the autonomy of the

press and preventing the evolution of a communications media which merely transmitted governmental policy or "current notions of social justice." Stewart, "Or of the Press," 26 Hastings LJ 631, 636 (1975), 460 U.S. at 583, n.6.

In Minneapolis Star, supra, Justice O'Connor discussed the analysis which the Framers of the First Amendment would have given to a classification scheme where the press was subjected to a differential tax, stating, in pertinent part:

> "There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment. The role of the press in mobilizing sentiment in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the antifederalists objected."

Thus, the tax exemption scheme in the instant case is an unconstitutional

infringement of the speech and press clauses of the First Amendment.

D. No evidence of impermissible motives or intent to infringe constitutional rights is necessary to prove a violation of the First Amendment.

In rejecting the appellant's argument that the statutory "magazine" and "newspaper" exemptions amounted to an infringement of the First Amendment, the Arkansas Supreme Court distinguished the instant case from Grosjean, supra. In Grosjean, the State of Louisiana had imposed a license tax on all gross receipts from the sale of advertising on those newspapers with a weekly circulation above 20,000. Of the more than 124 publishers in Louisiana, only 13 were subject to the tax. This Court found that

because the tax was tied irreparably to circulation and was intended to "curtail[ed] the flow of information," and because it impacted on a few publishers who would bear the taxation burden, it was an abridgement of the freedom of the press clause of the First Amendment. Id. at 250-251.[8]

However, although there is no evidence in this instant case of legislative intent to penalize the appellant, Grosjean and Speiser, nonetheless, reflect the importance of First Amendment values in assessing a tax statute. Those cases provide a framework for the determination of this case which involved

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[8]The Court characterized the tax in Grosjean as a "deliberate and calculated device in the guise of a tax to limit the circulation of information." 297 U.S. at 250. See, Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376 (1973).

a statute with a discriminatory effect, and no discernible purpose.[9]

Thus, the absence of a Grosjean-type legislative intent is certainly not fatal to appellant's case as this Court recognized in Minneapolis Star, supra, an illicit legislative intent is not the sine qua non of a violation of the First Amendment, and that even regulations aimed at "proper" governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.

Appellee has claimed that in determining the constitutionality of the exemptions and the statute as a whole, a court should attach some special significance to the

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[9]In Speiser, the Court held that a provision of the California constitution which conditioned the allowance of a property tax exemption to American veterans on their annually filing an oath of loyalty was a violation of the First Amendment right of veterans to freedom of speech without the procedural safeguards exacted by the due process clause of the Fourteenth Amendment.

fact that the Gross Receipts Tax is a general tax for revenue purposes, imposed on the sale of items and, thus, paid by the purchasers of the items. Appellee also argues that the fact that the tax exemption classification in Arkansas is not overtly "hostile" to the press cures any possible constitutional informity and goes on to cite Section 17 of the Gross Receipts Tax Act of 1941, which sets forth the original purpose of the Act as providing economic support for the schools, free textbooks, charitable institutions, and other equally worthy causes.[10] All of this rhetoric is empty, however, in view of this Court's holding in Minneapolis Star. The issue here is not whether there is a good reason for a tax, but whether there is a compelling reason for

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[10] Ark. Stat. Ann. §84-1903 provides, in pertinent part, "there is hereby levied an excise tax of three percentum (3%) upon the gross proceeds or gross receipts derived from all sales to any person...(a) tangible property..."

the discriminatory application of that tax to the appellant.

The "charitable" purposes of the original taxing statute are not in question, and those "charitable" purposes never rise to the status of a compelling basis for the discriminatory tax that constitutes the infringement of appellant's First Amendment rights.

CONCLUSION

For the foregoing reasons, the decision of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

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